Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-1698

RAYMOND MAYFIELD - - - - Petitioner

versus

COMMONWEALTH OF KENTUCKY,
Ex Rel. MARGIE R. PHELPS - - Respondent

On Petition for a Writ of Certiorari to the
Kentucky Supreme Court

BRIEF FOR RESPONDENT IN OPPOSITION

WALTER J. SWYERS, JR.
Suite 400 Burdorf Building
100 North Sixth Street
Louisville, Kentucky 40202
Counsel for Respondent

WESTERFIELD-SONTE CO., 619 W. KENTUCKY—P.O. BOX 3251, LOUISVILLE, KY.

INDEX

	PAGE
Citations	ii
Opinion Below	1
Jurisdiction	1
Question Presented	2
Constitutional Provision Involved	2
Statement of the Case	2
Argument	3–9
Conclusion	9–10

CITATIONS

Cases:

	PAGE
Cohen v. Berlin, 37 A. D. 2d 567, 323 N. Y. Supp. 2d 815	8, 9
Renick v. Renick, Ky., 57 S. W. 2d 663	6, 8
Richey v. Richey, Ky., 389 S. W. 2d 914	6
State v. Bowen, Wash., 498 P. 2d 877	5
Walker v. Walker, Fla., 266 So. 2d 385	5
Walters v. City of St. Louis, et al., 347 U. S. 231, 74 S. Ct. 505, 98 L. Ed. 660	4
Warner v. Ward, Ky., 401 S. W. 2d 62	6

Miscellaneous:

Kentucky Revised Statutes, 406.011 ..... 5, 6

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No. 76-1698

RAYMOND MAYFIELD - - - - *Petitioner*

v.

COMMONWEALTH OF KENTUCKY,
Ex Rel. MARG'E R. PHELPS - - *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE KENTUCKY SUPREME COURT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion below from the Kentucky Supreme Court, 546 S. W. 2d 433 is correctly set forth in Appendix A of the petitioner's Petition for Writ of Certiorari.

JURISDICTION

The jurisdiction for the Petition for Writ of Certiorari to the Kentucky Supreme Court was properly invoked by the petitioner under 28 U.S.C. § 1257(3).

QUESTION PRESENTED

Whether the decision of the Kentucky Courts, in refusing to vitiate an Agreement of Paternity and Support, entered into by the petitioner and respondent denies to the petitioner certain rights guaranteed him under the Fourteenth Amendment to the United States Constitution, which denounces the taking of property without due process of law and further denounces the failure to provide persons with equal protection of the laws.

CONSTITUTIONAL PROVISION INVOLVED

The petitioner correctly stated the Constitutional provision involved and is to be found on page 2 of petitioner's petition for Writ of Certiorari.

STATEMENT OF THE CASE

The respondent accepts, as being substantially correct, the petitioner's Statement of the Case, which is found at pages 3-4 of petitioner's Petition for Writ of Certiorari.

ARGUMENT

1. Whether This Court Should Undertake to Hear This Matter Since the Question Raised in This Appeal Was Not Decided by the Court Below.

The record will show that the petitioner first raised the issue, which is the basis for his contention of Jurisdiction, in his Petition for Rehearing to the Kentucky Supreme Court. In a seven page brief supporting the Petition for Rehearing, petitioner, on page 7 of that brief, states his sole basis for bringing this matter to this Court, as follows:

> The Fourteenth Amendment to our United States Constitution affords each of us the due process and equal protection of our laws. Further the Fifth Amendment of that same Constitution provides that a person's property may not be taken from him without due process of law, which due process it would seem should include the equal protection of the Court's in interpreting contractual obligations between the parties. By a reading of this Court's decision of October 29, 1976, Raymond seems to be penalized for complying with his portion of the agreement and Margie seems to be condoned for breaching the agreement.

Petitioner's contention of a constitutional question is very sketchy. The contention was neither argued by petitioner nor commented upon by that Court.

Further, the record will show that at no time previous to petitioner's Petition for Rehearing to the Kentucky Supreme Court was a Constitutional question either expressly contended or implied. This would

include the record of two Jefferson Circuit Court Commissioner hearing reports, the findings and order of the Jefferson Circuit Court and the petitioner's filings to the Kentucky Supreme Court and that Court's Mandate.

This Court has long held that it will not undertake to review what the Court below did not decide in *Walters* v. *City of St. Louis, et al.*, 347 U. S. 231, 74 S. Ct. 505, 98 L. Ed. 660 (1954). Since the constitutional contention in this matter is well within the jurisdiction of the Kentucky Supreme Court to decide, it appears that the Court included in its findings, by implication, that raising a constitutional question as a last minute appeal was not timely. Further, the record in this matter will clearly show that the matter has been subjected to numerous hearings and it is equally clear that petitioner both has had ample opportunity to present any constitutional questions in Kentucky and that petitioner has been afforded due process throughout the proceeding.

Respondent contends that the record in this matter shows that all questions before the Court have been completely exhausted and the writ should be denied.

2. Whether This Court Should Undertake to Hear This Matter Since the Issues Raised in This Appeal, Which Have Been Decided by the Court Below, Have Been Completely Exhausted.

The respondent, in addition to her contention that the writ should be denied because the constitutional

question raised herein has not been raised below, also responds to the arguments contained in the petition.

Petitioner reasons that the Agreed Order of January 18, 1974 was a contract between petitioner and respondent whereby through compromise petitioner admitted paternity in consideration of continuing child support in the modest sum of $10.00 weekly. Respondent continues to argue that petitioner and respondent were only free to contract regarding matters affecting themselves. They were not free to contract away the rights and opportunities of the infant child, Mia Geneen Phelps, and were not free to agree among themselves what their mutual and separate obligations to the child would be. In agreeing with respondent, the Kentucky Supreme Court had knowledge that it is also settled in other jurisdictions that parties to such agreements cannot negotiate away the rights of a party who is not a party to the agreement, specifically, the infant child Mia Geneen Phelps. *Walker* v. *Walker*, Fla., 266 So. 2d 385 (1972); *State* v. *Bowen*, Wash., 498 P. 2d 877 (1977).

Petitioner argues that the Court has granted to Respondent the best of all possible worlds by permitting her to modify an agreement while at the same time requiring that petitioner maintain his admission of paternity. Petitioner conveniently overlooks the above argument. Respondent argues that based upon petitioner's admission, the infant child has every right to rely upon it and, through her custodial parent Margie Phelps, to employ the provisions of Kentucky Revised Statutes § 406.011, which entitled her to the

same treatment from her illegitimate father as she might expect from a father of a legitimate marriage. Kentucky law clearly provides for such modification in both cases, through Kentucky Revised Statutes § 406.011 and *Renick* v. *Renick,* Ky., 57 S. W. 2d 663 (1973); *Richey* v. *Richey,* Ky., 389 S. W. 2d 914 (1965); *Warner* v. *Ward,* Ky., 401 S. W. 2d 62 (1966).

Petitioner relies upon the Agreed Order of September 15, 1973 to support his contention that he has not been afforded equal protection under the law. A review of this agreement will support a contrary conclusion.

MARGIE R. PHELPS - - - - *Plaintiff*

v.

RAYMOND MAYFIELD - - - *Defendant*

AGREED ORDER

• • •

Comes the Plaintiff, Margie R. Phelps, in person and by counsel, Walter J. Swyers, Jr., and the Respondent, Raymond Mayfield, in person and by counsel, Cecil A. Blye, Sr., and it is agreed as follows:

1. That Defendant is the father of Mia Janeen Phelps, born to Plaintiff, September 15, 1973, in Louisville, Jefferson County, Kentucky.

2. That Plaintiff has, and shall continue to have, exclusive custody of said Mia Janeen Phelps.

3. That Defendant agrees to pay or cause to be paid to this Court the sum of $10.00 per week

for care, support and education of said Mia Janeen Phelps from September 15, 1973 until further order of this Court. The amount of arrearage from September 15, 1973 until the date of this Agreed Order shall be paid by Defendant to Plaintiff, in lump sum, on the date of this Agreed Order, or within 60 days therefrom.

4. That Plaintiff agrees to forebear continued proceedings in this action, but, in the event of Defendant's failure to fulfill obligations of this Agreed Order, Plaintiff retains the right to pursue a satisfactory remedy in this action.

/s/ _____
JOSEPH RAY

1-18-74
DATE

Agreed to:

/s/ _____
Margie R. Phelps,
Plaintiff

/s/ _____
Walter J. Swyers, Jr.
Attorney for Plaintiff

/s/ _____
Raymond Mayfield,
Defendant

/s/ _____
Cecil A. Blye, Sr.
Attorney for Defendant

Paragraph 1 is the straightforward admission of paternity.

Paragraph 2 deals with custody of child.

Paragraph 3 deals with child support. It states an amount, it identifies the Court as payee, it states the purpose of the child support and it states the phrase *until further order of this Court.* It is clear that the italized phrase addresses the question of child support, only, because it is confined to the subject matter contained in Paragraph 3. Further, in Kentucky the *Renick* case and the *Richey* case, *supra,* recognize the phrase *until further order of this Court* as a phrase which provides for modification of child support. The agreement, then, expressly provides for modification of child support.

Paragraph 4 of the Agreed Order states that respondent agrees to forebear continued proceedings but has the right to pursue a satisfactory remedy in the event that petitioner fails to fulfill his obligations. Nowhere does Paragraph 4 qualify the expression contained in Paragraph 3 which clearly grants, through respondent, the right to modify child support. The meaning of Paragraph 4, with equal clarity, states that respondent agrees to forebear continued proceedings, so long as paternity is admitted, the arrearage is paid and child support payments be maintained, in whatever amount that be. There is no conflict between the paragraphs of this agreement by any reasonable interpretation.

Petitioner relies heavily upon his contention that New York law, through *Cohen* v. *Berlin,* 37 A. D. 2d 567, 323 N. Y. Supp. 2d 815, supports his argument. Petitioner states that the cases are alike in that the *Cohen* case involves an admission of paternity which

was vacated when the custodial parent sought a child support increase, which increase was not envisioned by an agreement between the parties. This simply is not true. The *Cohen* case is a landmark due process case in New York, but the due process question was raised clearly because the parties had failed initially at the time of the Agreed Order to give notice to public welfare officials as required by New York statute, therefore, the original agreement failed because due process was not respected. That original agreement was vacated, *ab initio.* The case simply has nothing to do with the merits of the instant case but only involves a similar fact situation. The New York case deals with an Agreed Order being void *ab initio* because due process requirements were not respected at the outset. The instant case concerns a contention of a later breach of an existing contract in the interest of a third party. All due process rights were respected in the later case.

The questions raised by petitioner have been exhausted through the appellate process provided in Kentucky. The case has been heard and reheard. The Kentucky Supreme Court has rendered a Mandate supporting respondent's contention, consistent with Kentucky law.

CONCLUSION

Petitioner has based this petition for Writ of Certiorari upon an issue which was not decided by the Courts below. Petitioner only raised the issue of a constitutional question by modest and vague reference in his Petition for Rehearing to the Kentucky Supreme Court.

The arguments presented by petitioner have been exhaustively expounded in Kentucky and the matter was afforded due process through its Courts. The decision for respondent in Kentucky squares with Kentucky law.

The question regarding the child support rights of illegitimate children does not compel a national forum. The rights of individuals are well established by this Court and states are rendering Mandates consistent with such national law, as evidenced by the Kentucky Supreme Court Mandate in this matter. This matter need not be heard.

Respondent respectfully petitions the Court to deny the petition for Writ of Certiorari in this matter.

Respectfully submitted,

WALTER J. SWYERS, JR.
Suite 400 Burdorf Building
110 North Sixth Street
Louisville, Kentucky 40202
Counsel for Respondent